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LABOR LEGISLATION—POLICE POWER OF THE STATE.

On August 10, 1906, the Court of Special Sessions of New York City, handed down a decision which has aroused much discussion among the members of the legal profession generally. The Court decided in the case of *People v. Williams*, that that portion of Section 77, Article 6, entitled "Factories" of the General Laws relating to Labor, which provided that no female shall be employed or permitted to work in any factory before 6 o'clock in the morning or after 9 o'clock in the evening of any day, etc., is an unconstitutional invasion of the rights of individual liberty and property and not within the police power of the Legislature.

Strange to say, this decision has been the occasion of rather severe comment by several of the current legal periodicals. In examining this decision the fact must not be overlooked, however, that its scope is by no means so far reaching as a cursory reading might seem to indicate. In fact another clause of the same statute, prohibiting women from working in factories more than ten hours a day, was not held to be unconstitutional, on the contrary the court intimated that the latter provision might well be viewed as a valid health law. *People v. Williams*, the court confined itself to a condemnation of that portion of the statute which authorized the conviction of an employer who should employ a woman in manufacturing during certain prescribed hours irrespective of the number of hours she had worked or had contracted to work on the day in question.

At present, in spite of the decision by the Supreme Court of the United States, in *Lochner v. New York*, 198 U. S. 45, holding

the limitation of a ten-hour day for employees of bakeries unconstitutional, there seems to be a growing sentiment in favor of the power of the State to enact such laws under the exercise of its police power.

To give an exact definition of the police power of the Legislature, which shall be neither too narrow nor too comprehensive, is probably impossible. The courts have consistently refused to to lay down any exact definition. *Stone v. Mississippi*, 101 U. S. 814. The police power of a State, however, is co-extensive with self-protection, and has been, not inaptly, termed "the law of overruling necessity." It is that inherent and plenary power in the State which enables it to prohibit all things detrimental to the comfort and welfare of society. *Lakeview v. Rosehill Cemetery*, 70 Ill. 194. The Legislature is endowed with discretion as to the extent to which its provisions shall go provided its acts do not go beyond the great principle of securing the public welfare. Its duty to provide for the public health and safety within well defined limits and with discretion is imperative. *State v. Noyes*, 47 Me. 189. But the police power of the State can never be invoked as an excuse for an arbitrary, oppressive and unjust legislation not in any way promotive of the public health, safety or morals. *Davidson v. New Orleans*, 96 U. S. 97.

In many states statutes, which apparently regulate the individual freedom of contract to a considerable degree, have recently been sustained as a valid exercise of the police power of the State. The Supreme Court of Massachusetts in *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 283, held that a statute forbidding the employment of women or children under 18, in manufacturing more than ten hours a day was constitutional as a valid health regulation. Also in the more recent case *State v. Muller*, (Oregon) 85 Pac. Rep. 855, it was held that a statute making it a misdemeanor for any employer to require any female to work in any factory, laundry or mechanical establishment more than ten hours a day, did not violate the 14th. Amendment of the Federal Constitution.

Such statutes as those just described must, however, be sharply distinguished from those of the character of the one repudiated in *People v. Williams*, Supra. There is no doubt that laws restricting the hours of labor uniformly for both sexes to reasonable periods would be valid as health regulations. And if we look upon limitations of the hours of labor in factories as a measure of physical protection, a discrimination between men and women cannot be condemned as arbitrary. *Freund on Police Power*, p. 298. But in every case where legislative enactments, which operate upon classes of individuals only, have been held valid, it has been where the classification was reasonable and not arbitrary. *Leep v. St. Louis Ry. Co.*, 58 Ark. 407.

Public policy requires the utmost freedom of contract. *Printing Co. v. Lampson, L. R. Eq.*, Cas. 462. Under the constitution women are entitled to the same rights as are secured to men. The law accords to her as to every other citizen, the

natural right to gain a livelihood by intelligence, honesty and industry in the arts, sciences, professions or other vocations. Before the law her right to a choice of vocations cannot be denied or abridged on account of sex. *Re Leach's Petition*, 134 Ind. 665. There would seem to be no reasonable ground except the single one of physical protection why a woman should be deprived of the right to determine for herself how many hours during each day she can and may work in an employment conceded to be lawful in itself and suitable for her to engage in. *Ritche v. People*, 155 Ill. 88; *Ex parte Kubach*, 8t Cal. 274. The police power, no matter how broad, is not above the Constitution. It is true that the conflict between the legislative act and a specific provisions of the Constitution or fundamental law must be clearly apparent or the Judiciary will not be justified in holding it unconstitutional. *Woodworth v. Union Pacific Ry. Co.* 18 Cal. 600. But to be sustained, the act passed in pursuance of the police power must have some apparent relation to the ends sought to be accomplished, *viz.*, to the comfort safety and welfare of society. It cannot invade the rights of persons and property under the guise of a police regulation when it is not such in fact. *Re Jacobs*, 98 N. Y. 98; *People v. Gillson*, 109 N. Y. 389.

Viewed in the light of the forgoing suggestions, the decision in *People v. Williams*, would seem to be in accord with the prevailing opinion at the present time. As was said in one of the comments on the case, it is probable that the chivalric favoritism for women, which prevails in this country probably more that anywhere else, rather than any scientific conviction of sanitary or hygienic ends, is the basis of such legislation.

CONTRACTS IN RESTRAINT OF TRADE—CLEMONS VS. MEADOWS.

A recent case reported in 94 S. W. 13, decided by the Court of Appeals of Kentucky, involves the legality of a contract between two competing hotel proprietors, whereby one agreed, for a consideration, to keep his hotel closed for a period of three years. This agreement was held to be void, as the hotel keeper owed a duty to the public, and could not contract in violation of this duty.

The law in regard to contracts in restraint of trade has undergone a gradual and beneficial reform, largely due to the changed conditions of the commercial world. The earliest cases reported on this subject show that contracts in restraint of trade, even though limited as to time and place were void as being against the common law. Year Book 2 Hers. 5 fol. 5, p. 26 (1415).

The strictness of this rule was due to the English law of apprenticeship. This law forbade any trade until a certain apprenticehip had been served and then a formal admission to a guild was required. The tradesman must have continued in that guild or do nothing. Naturally any agreement which would restrain his practicing his trade was severely dealt with. The courts would not allow a man to barter away his usefulness, and by enforced idleness, to a certain extent pauperize himself.

The law in this form remained for two hundred years unchanged. But in 1621, in the case of *Broad vs. Jollyfe*, Cro. jac. 596, the law was relaxed somewhat, and it was decided that, for a valuable consideration, one might agree not to use his trade in a particular place. It was said that the consideration was necessary in order to balance the restraint of trade. So too in *Davis vs. Mason*, T. R. 118, decided in 1793, a contract to refrain from a trade limited as to time and place, and founded on a valuable consideration, was held good. The basis of these decisions was that the restraint was limited in space for as it is said Cowen 307, decided in 1827, that "a restraint throughout the kingdom" was bad.

The final step in the development of this law, as shown by the modern authorities, was to disregard the partiality of the restraint, and decide the legality of each contract on its own facts and circumstances. The question as to the validity of the restraint imposed at present depends on what is reasonably necessary to protect the person for whose benefit the contract was made, having regard to the nature of the business and the territory embraced in its trading operations. *Diamond Match Co. vs. Robeer*, also *National Benefit Co. vs. Union Hospital Co.*, 11 S. R. A. 437 and cases cited.

In the case of persons owing a duty to the public, another question enters into such a contract. Here the public is affected more directly, and if the public interests are endangered, the contract threatening them must fall. In *Clemons vs. Meadows*, the two contracting parties were the owners of the only two first-class hotels in the town. An agreement to close one although for a limited time might affect the travelling public seriously. Although it is admitted that a hotel-proprietor might close his hotel if he so desires, yet the interest of the public demands that he shall not contract away his right to keep his hotel open in favor of a competing hotel manager. The court thus applies the same reasoning to agreements in respect to hotels as it does to similar contracts between railroads; the *ratio decidendi* is not the character of the contract, but the character of the contracting parties. But this power of the courts to declare a contract void on the grounds of public policy should be exercised guardedly, as it is quite as much in accord with justice that the liberty to make a legal contract should be protected as that a remedy for a breach of an illegal contract should be denied.

THE RIGHT TO SPECULATE IN THEATRE TICKETS UPHELD.

A decision of interest to proprietors of theatres, college athletic associations and all who sell tickets for any public performance or amusement was recently rendered by the Supreme Court of California in the case of *Ex Parte Quarg*, reported in the 84 Pac. 766.

In 1905 the Legislature of California passed a statute pro-

hibiting any person from selling tickets to theatres or other public places of amusement for a price higher than that originally charged by the management. An examination of the statutes of the various states discloses no similar enactments and it was probably passed in response to the constantly growing demand for the suppression of the professional ticket speculator.

The act is declared unconstitutional—not because it contravenes the 14th Amendment as to liberty of contract—but generally as opposed to that clause of the California constitution which secures to every person the right of "acquiring, possessing and protecting property."

There are two subsidiary grounds which seem to have much bearing on the final decision.

The first is that the right to provide entertainment for the public and to sell tickets therefor is strictly private and not a matter of such public concern or general interest as to come within the police power on the basis of protecting the public health, morals, safety or general welfare.

The second ground is that the statute in question does not attempt to prevent the simple resale or transfer of such tickets but only a resale at an *advanced* price over the original selling price and also that it is directed against the resale of all tickets whether assignable or not. Under the latter objection either or both the original or subsequent owners are bound by a scale of prices fixed at a level prescribed by the state.

It is at least questionable whether in any of the other states a theatre ticket is *property*. At common law it was a mere license revocable at the option of the original seller and to be held upon any condition which he might see fit to print upon it. Should the holder be refused admittance or, under the earlier decisions, even if expelled, his only redress was an action for the purchase price and the direct expenses to which he had been put by the refusal or ejection. *Horney v. Nixon*, 213 Pa. 20 (decided in 1905).

The right of the original vendor to make the ticket not transferable by a printed notice thereon was undisputed or at least not seriously contested, at least in this country, until the case of *Hollister v. Hayman*, 183 N. Y. 250. This was a test case and arose from the endeavors of a New York manager to drive away the speculators from the sidewalk in front of his theatre. All tickets sold at the box-office contained the restriction that they would not be honored if bought from *anyone* on the sidewalk in front of the theatre. The 14th Amendment was invoked by the speculators but the manager's right to freely impose any lawful conditions he saw fit was upheld by the Court of Appeals.

In 1893 the Legislature of California passed an act making a theatre ticket property, when sold unconditionally, and providing that any manager, proprietor, etc., who should refuse the holder admission to the place of amusement be fined $100, making a demand for admission necessary and operating only in

favor of those who presented themselves in proper condition for admission.

Tickets on which any conditions were printed or restrictions made in writing or printing by the original vendor were excepted from the operation of the act. In the case of *Greenberg v. Western Turf Assoc.*, 140 Cal. 360, the Supreme Court of California held the act to be constitutional and by this decision, probably for the first time, a theatre ticket was made property in the full sense of the word.

Conceding therefore that the regulation of traffic in theatre tickets is beyond the police power of the state, the decision in the latest case (*Ex Parte Quarg*) is justified by the statute of 1903, making the ticket property when sold without conditions. The distinction drawn between the regulation of all sales and the prohibition of sales at an advance while clear enough is unnecessary to the decision of the case.

While all theatre-goers realize and feel the effect of the tendency to manipulate the sale of tickets for all the popular amusements and to hold the most desirable seats at almost prohibitive figures, a summary of the decisions would indicate that the remedy must be provided by the proprietors or managers of the amusements and that such control or regulation is entirely beyond the power of the Legislatures.

THE RIGHT OF A JURY TO DRAW ANY INFERENCE FROM THE REFUSAL OF A PARTY TO WAIVE PRIVILEGE.

In the late case of the *Penna. R. R. Co. v. Durkee*, decided July 24, 1906, the U. S. Circuit Court of Appeals for the second circuit overrules the Appellate Division of the New York Supreme Court, by holding that in an action for damages, for injuries to the person, the trial judge properly refused to charge the jury that they might infer that the plaintiff's refusal to waive her privilege, and allow her physician to testify as to her condition, was due to the fact that such testimony would have been unfavorable to her, or in fact to make any inference at all.

This question of inference from refusal of party to waive privilege has been a long mooted one, and in the case of *Deutschmann v. Third Ave. R. R. Co*, 87 App. Div. 503, where the facts were very similar, the Appellate Division holds directly opposite to the case under discussion, and in the opinion says; "the jury is always justified in talking into consideration the attitude, appearance, and acts of parties and witnesses upon a trial, and to deduce therefrom such inferences as fairly arise out of the given circumstances, and we see no reason why they may not also take into consideration any objection interposed which shuts out the introduction of testimony. And in *William v. Roch R. Co.*, 3 App. Div. 109, the court in discussing this question says: "I think the rule is as applicable to a case in which a party fails to interrogate a friendly witness, so situated as to be presumed to have knowledge of the existence or non-existence, of the vital facts in

issue, as it is in the case of a failure to produce such a witness. I think the omission to interrogate a friendly witness in respect to facts presumably within his knowledge, is more significant than the failure to call such a person as a witness, and that the presumption that the testimony would not have been favorable to the party's case is stronger than the one which arises from the failure to produce such a person as a witness." To like effect are *Kane v Rochester Ry. Co.*, 74 App. Div. 575, and *People v. Hovey*, 92 N. Y. 554. The upholders of this strict construction, adopted by the Appellate Division, base their opinion also on the ground of fraud and the great dangers arising from the abuse of the privilege where a more liberal view is taken.

CONTRADICTORY STATEMENTS—STATEMENTS CONSISTENT WITH TESTIMONY.

In *Burks v. State*, 93 S. W., 983, decided by the Supreme Court of Arkansas, in March, 1906, it was held that where a witness has denied having made statements contradictory of his testimony, and evidence of contradictory statements is admitted, former statements of his consistent with his testimony are not admissible to support him, in the absence of proof of change in the circumstances or relations which might have prompted a recent fabrication or design to misrepresent the facts.

In *Robb v. Hackley*, 23 Wend. 52, it was strongly asserted by Bronson, J., "But as a general, almost universal rule, evidence of what the witness has said out of court, cannot be received to fortify his testimony. It violates the first principle in the law of evidence to allow a party to be affected either in person, or property, by the declaration of a witness made without oath. It is no answer to say that such evidence will not give credit and, therefore, can do no harm. Evidence should never be given the jury which they are not at liberty to believe."

Formerly in England, previous consonant statements by a witness were considered admissible in evidence to support his testimony, given by him at the trial, the same as previous inconsistent statements to impeach him. *McCord v. State*, 83 Ga. 521.

This broad rule, however, was found to be radically unsound and from the time of the case *King v. Parker*, 3 Douglass 242, has generally been considered as exploded.

A remnant of the rule may be expressed as we find it in 1 Thomp. Tr Sec. 574, where the witness is charged with testifying under influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive had no existence. This view is entertained by Greenleaf, but he otherwise follows the great weight of authority which hold that such statements are not admissible in evidence to fortify the testimony of the witness.

The most that could be claimed for such testimony in this view, would be, that it rendered the last statement more prob-

able and worthy of credit, because, although the witness had made a contradictory statement he had made another statement similar to those to which he had testified before a jury. *Com. v. Jenkins*, 10 Gray 485.

A man untruthful out of court is likely to be untruthful in court. Since the self contradiction is conceded, it remains a damaging fact, and it is in no sense explained away by the consistent statement. It is just as discrediting if once uttered, even though the other story has been consistently told a score of times *Kipp v. Silverman*, 25 Mont. 295.

Although the above side of the question as to the inadmissibility of such statements is supported by an overwhelming weight of authority, yet the courts which hold to the doctrine based on the admissibility of such consistent statement are not entirely void of reason. The admissibility of such evidence rests on the obvious principle, that as conflicting statements impair, so uniform and consistent statements sustain and strengthen his credit before a jury. This reasoning, however, is not true to generally accepted principles. All will concede that an untruth leaves its mark on the character of the publisher and no amount of good done by the person can clear the character of that blemish. In as much as this applies to every day affairs of life, why depart from the principle simply because it is being acted upon in legal proceedings? In some jurisdictions such a statement is admitted for the purpose of sustaining the credibility of the witness, but not for the purpose of confirming his statement as to the facts sworn to by him at the trial. *State v. Parish*, 79 N. C. 610.

Even in those jurisdictions where consistent statements are allowed, the courts are unwilling to announce the doctrine unqualifiedly, but hedge the principle about with innumerable refinements.

NOVATION DISTINGUISHED FROM ACCORD WITHOUT SATISFACTION.

The tendency of the courts is to favor compromise agreements, and to support their terms wherever possible. The question, however, whether the compromise agreement will be considered as a novation, or as an accord without satisfaction is often times of great difficulty to determine. If a novation, the new contract completely extinquishes the old and forms the basis of further settlement. If it is an accord without satisfaction, the old contract survives and its terms may be enforced

In *Bandman v. Finn*, decided June 21, 1906, in New York Court of Appeals on an appeal from the Appellate Division (89 N. Y. App. 504), Cullen, Ch. J reviews this question. Here there was an unmatured and contingent obligation, for which the plaintiff had no cause of action. The parties had agreed for a settlement by the payment of a smaller amount than that contemplated upon the happening of the contingency. Such an agreement, it was held, constituted a novation and the plaintiff

was not allowed to recover on his original obligation. Haight J., *dissenting*.

The common conception of a novation is that of an agreement whereby a third person is substituted to the rights and liabilities of one of the original contractors. The form of novation here treated is that of a substitution of a new agreement for an old one, the parties remaining the same. In a novation there must be an extinguishment of the original obligation by the substitution of a new contract. A cause of action on contract or tort may be extinguished by an agreement between the parties There is no need that this agreement which is the consideration for the satisfaction should be executed; it may be executory. If the subsequent agreement is accepted in satisfaction, and this appears expressly or by implication, the original cause of action is merged and extinguished. *Kromer v. Heim*, 75 N. Y. 574. A new contract inconsistent with the original impliedly discharges the latter without express provision to that effect. *Renard v. Sampson*, 12 N. Y. 561; *Stow v. Russel*, 36 Ill. 18.

If one having a debt or claim against another, satisfies or releases it in consideration of an executory promise by the debtor, he cannot afterward enforce his original cause of action upon a mere failure of the other party to perform his promise, for he has a remedy to compel performance. *Morehouse v. Second N. B.*, 98 N. Y. 503. A promise itself constitutes sufficient consideration to support a new agreement. *Nassoiz v. Tomlinson*, 148 N. Y. 326. It is not, therefore, material whether the disputed claims were valid or not. *Wehrum v. Kuhn*, 61 N. Y. 62; *Flegal v. Hoover*, 156 Penn St. 276. But the claims must have been bona-fide. Cases collected, 2 Ed. Clark on Cont. 125.

Accord and satisfaction is an agreement between two parties to give and accept something in satisfaction of a right of action which one has against the other, which when performed is a bar to all actions upon this account (*Bouvier's Dict.*) The original obligation must be an existing obligation and continue until complete execution of the new agreement. If the execution of the new agreement fails the original obligation survives. *Hearn v. Kiehl*, 38 Penn. St. 146. While a new agreement may not discharge a prior contract the performance of the new agreement will do so. *Rogers v. Rogers*, 139 Mass. 440; *Thompson v. Poor*, 147 N. Y. 402. Where an accord is relied on it must be executed; readiness to perform is not sufficient, nor is part performance adequate. An accord must always be entirely executed and not executory in any part. 2 Parsons on Cont. 193; *Russel v. Sytle*, 6 Wend. 390. Where a novation is relied, on failure to perform does not subject the party to liability under the old original debt or claim. It does not work the hardship which failure to perform an accord often does, and for this reason is encouraged by the courts. Accord and satisfaction when it consists in the substition of a new contract for an old one, and the substituted contract is accepted without performance as a satisfaction of the old

contract, is a novation. (Note to *Harrison v Henderson*, 67 Kan 194) in 100 Am. St. Rep. 393.)

The courts in every case try to carry out the intention of the parties manifested by the compromise agreements, and as intimated above lean towards construing doubtful cases as novations, rather than accords without satisfaction. The interests of justice are thus considered better maintained.

This matter of privileged communication is of great antiquity, and is one of the safeguards that both the American and English courts have seen fit to throw about private affairs, and to preserve inviolate the confidential relations of patients with their physicians and clients with their lawyers. It is a safeguard similar to that recognized in criminal cases where no inference is allowed to be drawn from the failure of the accused to take the stand. To allow any inference to be drawn either favorable, or unfavorable, from a refusal to waive the privilege of a confidential communication to a physician is only to nullify the effect of such a provision. It is true that the privilege is susceptible of great abuse, but the very strict construction of the rule, given to it by the Appellate Division, in doing away with this evil, tends to cause a much greater evil by practically abolishing the privilege itself.

The text books and the other states uphold the decision of the Circuit Court of Appeals and Wigmore in his work on Evidence, Sec. 2386 specifically says: "When the privilege is claimed by a patient who is a party, no inference as to the facts suppressed can be drawn" and the Supreme Court of Indiana in *Hackney, et al. v. Foyce, et al*, 156 Ind. 535 holds that: "The purpose of the statute has its roots in public policy, and is intended to promote that confidence and full disclosure often absolutely necessary to a correct treatment of the patient, and which may be withheld under impending danger of publication. * * * Shall the efficacy of the statute be destroyed by indirection? To claim the protection of the statute is the legal right of a patient, or his representative, and of no less inviolability than any other personal right, and it is wholly inconsistent with that right to say that its exercise in a judicial proceeding shall be allowed to prejudice the cause of him who claims it." On grounds of logic and reason, the Appellate Division should adopt this rule of evidence sanctioned by the general consensus of judicial opinion, but the court closes its eyes to these considerations and justifies under *stare decisis*.